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Nos. 93-1456 and 93-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents,

WINSTON BRYANT,
Attorney General of Arkansas,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents,

On Writs of Certiorari to the Supreme Court of Arkansas

BRIEF FOR RESPONDENT CONGRESSMAN RAY THORNTON

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QUESTION PRESENTED

Whether a State may unilaterally impose qualifications upon candidates for the United States Congress by restricting access to the ballot for certain candidates, even though Article I of the United States Constitution sets forth the qualifications for members of Congress as part of a comprehensive scheme for the election of national legislators.

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BRIEF FOR RESPONDENT CONGRESSMAN RAY THORNTON

STATEMENT

During the debates over the ratification of the proposed Constitution, opponents mounted unsuccessful efforts in several States to amend the document in order to provide for term limits for members of Congress—a limitation the Framers had eliminated during the Constitutional Convention. More than 200 years later, petitioners and their supporters contend that the Framers' rejection of term limits was meaningless and that anti-Federalist efforts to amend the Constitution to provide for rotation were entirely superfluous. According to petitioners, States have always possessed the authority to impose additional qualifications for membership in Congress without following the process for constitutional amendment specified in Article V. Thus, they maintain that an amendment to the Arkansas constitution expressly designed to "disqualify congressional incumbents from further service" (Pet. App. 15a) is constitutionally permissible.

These contentions are profoundly mistaken. As the anti-ratification forces clearly recognized two centuries ago, the text and structure of Article I preclude the imposition of additional qualifications for membership in Congress by any means other than by amending the Constitution itself. Moreover, as this Court acknowledged in *Powell* v. *McCormack*, 395 U.S. 486 (1969), the history surrounding the drafting and adoption of Article I reinforces what the text and structure reveal—that the Framers eliminated term limits and other then-common disabilities and prescribed only a limited, and exclusive, number of qualifications to ensure voters the widest possible choice of federal representatives.

Amendment 73, by contrast, seeks to circumscribe the choice of individual voters in federal elections and to disable permanently a specific class of candidates for Con-

gress. Whether such limitations are wise as a matter of public policy is not the issue in this case. The language and structure that the Framers chose for Article I prevents the adoption of term limits, or any other qualifications for congressional office, by individual States. If such limitations are to be imposed, they must be adopted by amending the Constitution itself.

Amendment 73

The first words of Amendment 73 label it the "Arkansas Term Limitation Amendment." Pet. App. 2a. Its preamble further states that the people of Arkansas have found that entrenched incumbency causes elected representatives to be "preoccupied with reelection and [to] ignore their duties as representatives." Pet. App. 3a. It further postulates that "entrenched incumbency" has "reduced voter participation" and has created an electoral system that is "less representative than the system established by the Founding Fathers." *Id.* "Therefore," the preamble concludes, "the people of Arkansas, exercising their reserved powers, *herein limit the terms of the elected officials.*" Pet. App. 4a (emphasis added).

To that end, Amendment 73 provides that "[a]ny person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas." *Id.* The same language is used for United States Senators, except that they are limited to "two or more terms." Pet. App. 5a.[1]

The Proceedings Below

Shortly after Amendment 73 was adopted, respondents Bobbie Hill and the League of Women Voters of Arkansas filed this suit in Pulaski County Circuit Court seeking

[1] Amendment 73 also limits the terms of state elected officials and representatives. These provisions are no longer at issue in this case.

a declaratory judgment invalidating the Amendment. Pursuant to an Arkansas statute requiring plaintiffs to name as defendants "all persons . . . who have or claim any interest which would be affected by the declaration," the complaint named, among other defendants, the Arkansas delegation to the United States Congress, including respondent Ray Thornton. See Ark. Code Ann. § 16-111-106 (1987).

Several of the defendants, including Representative Thornton, sought a declaratory judgment that Amendment 73 is unconstitutional insofar as it establishes an additional qualification based on prior service for membership in Congress. The parties filed cross-motions for summary judgment. Thereafter, on July 29, 1993, the Pulaski County Circuit Court held that Amendment 73 "is as much a qualification as wealth, position or poverty," and that the power to restrict the number of terms served is "a power given by the whole body politic to the Constitution which cannot be usurped by individual actions of the several states." Pet. App. 49a.

The Arkansas Supreme Court agreed that the provisions of Amendment 73 limiting the terms of federal legislators are unconstitutional. The court held that the Framers created uniform rules for the qualification of federal legislators, and precluded the States from establishing "sundry experience criteria . . . [that] would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit in Congress." Pet. App. 14a. It rejected the claim that Amendment 73 is not a qualification but instead a mere ballot access regulation, finding that "[t]he intent and effect of Amendment 73 are to disqualify congressional incumbents from further service." Pet. App. 15a.

SUMMARY OF ARGUMENT

I. Article I of the Constitution creates the national legislature and comprehensively regulates its composition and selection. As part of this comprehensive scheme, the so-called "Qualifications Clauses" prescribe the uniform and exclusive attributes for membership in each House of Congress, using language that parallels the language used in Article II to create the exclusive qualifications for the office of the President. Article I also provides for any limitations on the broad pool of potential candidates otherwise defined by the Qualifications Clauses.

Although Article I grants States authority to prescribe the qualifications of electors, it delegates no similar authority to the States (or to Congress) concerning the qualifications of who may be elected. And in delegating to States the authority to conduct the local functions necessary to elect a national legislature, Article I cabins this power by granting Congress an extraordinary authority to make or alter state election laws.

Because it comprehensively regulates the composition of the national legislature and delegates to the States carefully circumscribed authority in related areas but not in the critical area of legislative qualifications, the text and structure of Article I leave no room for States to establish additional qualifications for membership in Congress. Given the uniquely national concerns at stake in the composition of a national legislature, the Tenth Amendment can reserve no authority to the States in this area. Rather, Article I's comprehensive regulation completely pre-empts State authority to prescribe the characteristics of federal legislators.

II. The history surrounding the drafting, ratification and early interpretation of the Constitution shows overwhelmingly that the Framers intended what the text and structure plainly reveal—*viz.*, that the qualifications set forth in Article I are exclusive. Writing at a time when state constitutions prescribed numerous and varying qualifications, the Framers explicitly considered and rejected a number of requirements, including a rotation or term

limit proposal. They did so for reasons that are antithetical to state imposition of such limitations, and their statements and actions make clear that they did not believe States retained any authority over federal legislative qualifications. Indeed, the Framers considered but did not adopt proposals to delegate authority to the States to prescribe certain types of qualifications.

The anti-ratification forces understood that the Constitution omitted term limits, and that this omission could be remedied only by amending the Constitution itself. In attempting to placate this opposition, proponents never suggested that States could add qualifications. To the contrary, they argued that the recitation of a minimal and exclusive set of qualifications was beneficial, and they opposed efforts to amend Article I to include term limits on the ground that such limitations abridged the people's right to choose their representatives in Congress. Consistent with this understanding, the early Congresses considered and rejected constitutional amendments to provide for term limits and deemed additional state qualifications unconstitutional.

III. This Court's precedents confirm that the constitutional qualifications are exclusive. Relying on the foregoing history, this Court has held that the *only* qualifications that may be imposed for membership in Congress are those specified in the Constitution. *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Nixon* v. *United States*, 113 S. Ct. 732 (1993).

IV. Amendment 73 establishes an additional, and thus unconstitutional, qualification for members of Congress. The Arkansas courts concluded that both the purpose and the effect of the law is to disqualify congressional incumbents from further service. That finding is clearly correct. Amendment 73 declares that it was enacted for the express purpose of limiting the terms of incumbents, and indeed, that is its only purpose. The Arkansas courts' finding that exclusion of incumbents from the ballot will accomplish this goal is supported by the record in this

case, as well as the history of write-in candidacies throughout this century.

Petitioners' suggestion that Amendment 73 is permissible because it does not bar from Congress an incumbent who somehow manages to win as a write-in is fundamentally flawed. Whether a law creates an additional qualification is to be determined not by resort to narrow dictionary definitions, but by reference to the essential democratic principles that the Framers sought to enshrine in Article I—namely, that the door to the national legislature should be open to all and that voters should be allowed to vote for whomever they please. Judged under this standard, a ballot exclusion law that disqualifies persons based upon prior service is plainly an improper qualification.

Nor can Amendment 73 be justified as a mere ballot access regulation. Unlike earlier laws that this Court has sustained, Amendment 73 is not an even-handed regulation designed to facilitate voter choice, nor does it regulate the conduct of state officeholders. Rather, the term limit law manipulates election procedures in order to disable an identifiable class of persons from service in the federal legislature. Such manipulation is entirely outside the authority of States under the Times, Places and Manner Clause.

ARGUMENT

I. THE TEXT AND STRUCTURE OF ARTICLE I OF THE UNITED STATES CONSTITUTION SET FORTH A UNIFORM AND EXCLUSIVE SET OF QUALIFICATIONS FOR MEMBERS OF CONGRESS.

A. The Text And Structure Of Article I Comprehensively Regulate The Qualifications For And Selection Of Federal Legislators.

Article I sets forth a comprehensive scheme for the composition and election of the national legislature. Article I addresses who may choose federal legislators (§ 2, cl. 1),[2] who may be chosen (§ 2, cl. 2 and § 3, cl. 3),

[2] Section 2, Clause 1 provides that the members of the House shall be chosen "by the People of the several States." Section 3, Clause 1 originally provided that the two Senators from each state were to be "chosen by the legislature thereof." In 1913, the Seventeenth Amendment modified this provision to permit popular election of Senators. The determination of which "people" are qualified to vote is also fixed by Article I, Section 2 (and by the Seventeenth Amendment's later adoption of Section 2's standard).

and how often they are to be chosen (§ 2, cl. 1 and § 3, cl. 1). It also grants to Congress the authority to "make or alter" the regulations of the States respecting the "Times, Places, and Manner of holding elections for Senators and Representatives" (§ 4, cl. 1), to judge the "Elections, Returns, and Qualifications of its own Members," (§ 5, cl. 1), and to expel members (§ 5, cl. 2). In language that is both broad and specific, Article I creates the national legislature and addresses every facet of its composition and selection.

Most pertinent to this case are Section 2, Clause 2 and Section 3, Clause 3 of Article I. These so-called "Qualifications Clauses" prescribe three minimal requirements for members of Congress: age, number of years of United States citizenship, and place of inhabitancy. They do so, moreover, in language that the Framers understood to preclude alteration except through other constitutional provisions. The negative wording the Framers used in these provisions (*i.e.*, "No person shall be a [Representative or Senator] who shall have . . .") is used in Article II, Section 1, Clause 5 to prescribe the qualifications for the office of the President.[3] Just as a constitutional amendment was necessary to add a qualification based on tenure for this office of the national government (see amend. XXII), so too a constitutional amendment is nec-

[3] This negative formulation was also used in several state constitutions in 1787 to establish exclusive qualifications. *See* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 422-23 n.1 (1928) (hereinafter "WARREN"). As this Court has previously explained, the negative phrasing was introduced in Article I by the Constitutional Convention's Committee of Style and was not intended to render the qualifications non-exclusive. *Powell*, 395 U.S. at 538-39.

essary to add such qualifications for members of the national legislature.

The text of the Constitution also prescribes specific limitations on the broad pool of candidates otherwise defined by these qualifications. Article I, Section 6, Clause 2 prohibits persons holding office "under the United States" from being members of either House while their tenure in office continues.[4] Article VI, Clause 3 requires that members of the House and Senate must agree to be bound by oath or affirmation to uphold the Constitution and, as an adjunct, provides that this requirement does not permit the imposition of any form of religious test.[5] Although petitioners note these provisions (State Br. at 37-38, Term Limits Br. at 49), they misconstrue their import: each highlights the fact that, where the Framers saw a need to disqualify a class of candidates, they did so in the text of the Constitution itself. The Framers did not leave the resolution of such issues to the States.

The extent of this control over the election of federal legislators is further reflected in Congress's power under Section 4 to "make or alter" state laws regulating congressional elections. This unique authority goes far beyond Congress's traditional power under the Supremacy Clause to pre-empt or supplant state law through the creation of federal laws. See art. VI, cl. 2. Section 4 actually grants Congress the power to exercise the legislative authority of a particular State and to make or amend that State's election laws. Such an extraordinary grant of authority reflects the Framers' commitment to a uniform

[4] James Madison listed this disqualification, together with the requirements specified in Sections 2 and 3, as the uniform and constitutionally regulated "qualifications of the elected." *See* THE FEDERALIST No. 52, at 326 (Clinton Rossiter ed., 1961) (hereinafter "THE FEDERALIST").

[5] The Fourteenth Amendment also adds to the Constitution a provision disqualifying from service in Congress anyone who fought on behalf of the Confederacy during the Civil War. *See* U.S. Const. amend. XIV, § 3.

scheme for the qualification, election, and assembly of a wholly national legislature.

Article I, Section 2 likewise imposes a significant limitation upon the States' constitutionally delegated authority to determine the qualifications of voters. Although petitioners attempt to characterize this provision as a " 'comprehensive' delegation of power" (State Br. at 12), it contains an important internal check on the exercise of the authority granted. In order "to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections" (*Tashjian* v. *Republican Party*, 479 U.S. 208, 228 (1986)), the Framers specified that the qualifications of voters in congressional elections must match those that the State requires for electors of the most numerous branch of its own legislature. Section 2 thus precludes States from creating unique qualifications for voting in federal elections, and permits States to disenfranchise federal electors only insofar as they are willing to strip their citizens of the right to vote altogether.[6]

The structure of Article I, Sections 2 and 3 underscores the exclusively constitutional nature of qualifications for federal legislators. The second clause of Section 2, the Qualifications Clause for House members, follows immediately after the clause providing that the electors in each State must have the same qualifications as the electors for the most numerous branch of the state legislature. Plainly, the Framers knew how to delegate authority to the States with respect to qualifications and did so in the case of electors. They did not do so, however, in the case of those who may be *elected*. That silence under-

[6] The Framers saw this self-policing mechanism as an important check on state authority. Leaving the qualification of federal electors "to the legislative discretion of the States would have been improper," James Madison explained, because "it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone." THE FEDERALIST No. 52, at 326.

mines completely petitioners' claim that States were granted plenary authority to impose qualifications.

The Framers' decision not to grant States authority over the qualifications of federal legislators is likewise reflected in the structure of Section 3. The first two paragraphs of this Section set forth the length of senatorial terms, empower state legislatures to choose Senators, stagger the terms of the first three classes of Senators, and authorize States to fill vacancies. The paragraph setting forth qualifications follows immediately thereafter. Again, however, the Framers omit any reference to state authority in this last, and crucial, provision.

B. The Constitution's Comprehensive Regulation Leaves No Room For State Authority Over The Composition Of The National Legislature.

As the text and structure of Article I show, the exclusivity of the qualifications of federal legislators embodied in Article I "was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *INS* v. *Chadha*, 462 U.S. 919, 946 (1983). The Framers created a new national legislature, comprehensively prescribed the qualifications (and any departures from those qualifications) for its members, and expressly delegated to the States carefully circumscribed authority to perform the local functions necessary to the election of a national legislature. Petitioners are thus wrong in arguing that the Constitution is "silent" or at least "ambiguous" with respect to the States' authority to add qualifications for representatives to Congress. State Br. at 39; Term Limits Br. at 7, 32. By addressing the issue of qualifications comprehensively, and by delegating to the States circumscribed authority in related areas, but not in the critical area governing the qualifications of federal legislators, the Constitution leaves no room for States to establish such qualifications.

Petitioners' reliance on the Tenth Amendment is thus misplaced. Given the peculiarly national concerns at

stake in the composition of a national legislature elected by the "People of the *several* States," (art. I, § 2 (emphasis added)), the text and structure of Article I pre-empt the authority of individual States in this exclusively federal area. By defining the fundamental characteristics of the national legislature, these provisions define a sovereignty that is, by its very nature, beyond the scope of state authority. Thus, unlike the cases petitioners rely upon, this case does not concern "the structure of [the State] government, and the character of those who exercise [State] government[al] authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (judges); see also *Tafflin* v. *Levitt*, 493 U.S. 455, 458-61 (1990). Nor does it involve any congressional attempt "to employ state governments as regulatory agencies." *New York* v. *United States*, 112 S. Ct. 2408, 2421 (1992).

Because the Constitution speaks to the issue here in specific terms, the question of reserved powers simply does not arise. *Cf. id.* at 2417 ("[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states"). Indeed, the principle that state authority over a uniquely federal matter is pre-empted by the mere fact of congressional action in that area must apply with even greater force here, where the Constitution itself, rather than a treaty or federal law, speaks in comprehensive terms to the federal issue. *Cf. Missouri* v. *Holland*, 252 U.S. 416, 434-35 (1920) (Tenth Amendment could not support state law in the face of a treaty involving a "national interest of very nearly the first magnitude"). Thus, given the language and structure of Article I governing congressional elections, only an express delegation of authority could allow the States to limit the length of service for members of the national legislature. Petitioners cannot identify any such delegation of authority in the Constitution.

II. THE HISTORY OF THE CONSTITUTIONAL CONVENTION, THE RATIFICATION DEBATES, AND THE ACTIONS OF THE EARLY CONGRESSES DEMONSTRATE THAT THE CONSTITUTION ESTABLISHES THE EXCLUSIVE QUALIFICATIONS FOR FEDERAL LEGISLATORS.

Far more than the language and structure of Article I, however, dictate that Amendment 73 is unconstitutional. The history surrounding the drafting, ratification and early interpretation of the Constitution's prescription of qualifications provides overwhelming evidence that the Framers intended precisely what Article I itself demonstrates—*i.e.*, that, subject to only a few essential qualifications, voters should have the right to choose anyone they wish to represent them in the national legislature.

A. The Convention Debates Confirm That The Qualifications Prescribed By The Constitution For Federal Legislators Are Exclusive.

1. *The Debates Surrounding the Qualifications Clauses Demonstrate That the Framers Rejected Term Limits and Other Qualifications and Intended to Preclude Congress and the States From Imposing Such Requirements.*

As both petitioners note, during early debates over the Qualifications Clauses, John Dickinson opposed "any recital of qualifications in the Constitution" because in his view, "[i]t was impossible to make a compleat [list] and a partial one would by implication tie up the hands of the Legislature from supplying the omissions." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 123 (Max Farrand ed., 1966) (hereinafter "FARRAND"). In suggesting that States retain the authority to fill such gaps, petitioners completely miss the import of Dickinson's comment. The Framers acted not because of, but in spite of, his observation that a prescription of qualifications *would* preclude the adoption or imposition of others. Accordingly, the Framers deliberately chose to recite a bare—and uniform—minimum of qualifications. See *Powell*, 395 U.S. at 533 (noting that Dickinson's position

"was *rejected*") (emphasis added).[7] Writing at a time when state constitutions (themselves only recently drafted) imposed numerous and diverse eligibility requirements for state legislators, the Framers intentionally placed a few explicit restrictions on the people's choice of potential federal representatives, leaving no room for either federal or state legislatures to add other restrictions.

Rotation. Most significantly, the Framers deliberately rejected a term limitation, or rotation, requirement similar to Arkansas Amendment 73. As originally proposed, the Virginia Plan expressly provided that members of the federal legislature would be "incapable of re-election for the space of —— after the expiration of their term of service." 1 FARRAND 20 (omission in original).[8] The Convention never attempted to choose a period of ineligibility. Instead, on June 12th, the Framers agreed, without dissent, to delete this provision. Although the Convention revisited numerous other decisions (see, *e.g.*, *infra* at 19 n.19, 20-21), rotation for federal legislators was never again proposed.

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[7] The Court's observation likewise applies to the other comments petitioners cite. Term Limits Br. at 41. Moreover, petitioners misconstrue James Wilson's statement. Wilson, who was so "agst. abridging the rights of election in any shape" that he opposed even an age qualification (1 FARRAND 375), objected to giving Congress unlimited authority to set qualifications because this would render the Constitution's prescription superfluous. 2 FARRAND 251. Nor is there any merit to the suggestion (Term Limits Br. at 41) that an inference of exclusivity would arise only from a "long[er] or [more] detailed" list of qualifications.

[8] The State mistakenly asserts that the Virginia Plan initially stated that "'any person possessing [certain previously recited] qualifications may be elected except.'" State Br. at 41 (emphasis omitted). The Virginia Plan contained no such language. *See* 1 FARRAND 20-22 (setting forth the fifteen Virginia Resolutions). The language to which the State refers appears in notes Edmund Randolph took as a member of the Committee of Detail. *See* 2 FARRAND 137 n.6. As respondent demonstrates below, petitioners completely misconstrue the significance and meaning of those notes. *See infra* at 22-23.

Petitioners mistakenly contend that this provision was deleted because the Framers wished to avoid excessive detail in the Constitution (Term Limits Br. at 39) and because they preferred a non-uniform rule on rotation. *Id.*; State Br. at 43. The Framers did not "drop" rotation as "too detailed" for inclusion in a constitution. After agreeing to a national legislature with two branches, the first of which was to be elected by the people of the several States (1 FARRAND 47-50), they "*postp*[*one*]*d*" consideration of *all* "[t]he remaining Clauses of Resolution 4th relating to the qualifications of members of the National Legislature." *Id.* at 50-51 (emphasis added; brackets omitted).[9]

When they returned to the subject two weeks later, the Framers did not mention either of petitioners' proffered reasons for jettisoning the rotation provision. See *id.* at 217. Both then and later, the Convention entertained far more detailed proposals on such matters as the compensation to be paid federal legislators[10] and included provisions corresponding to all of the "postponed" clauses *except* rotation.[11] Nor did a single delegate oppose rotation because it was uniform. To the contrary, a desire for uniformity animated the debates in a host of areas,[12]

[9] The "remaining clauses" concerned frequency of elections, length of terms, amount and source of compensation, minimum age requirement, ineligibility for state or federal offices, and rotation. 1 FARRAND 20-21.

[10] For example, the delegates discussed whether the Constitution should have a clause tying congressional compensation to the value of a commodity such as wheat (1 FARRAND 216) or a formula based on the distance a representative traveled to and from the Capital. 2 FARRAND 293.

[11] *Compare* 1 FARRAND 20 (Fourth Resolution of the Virginia Plan) *with* art. I, § 2, cls. 1-2; art. I, § 3, cls. 1, 3; art. I, § 6.

[12] *See, e.g.*, 1 FARRAND 216 (Mason) (opposing payment of congressional salaries by the States because the States "would make different provision . . . and an inequality would be felt among them, whereas . . . they ought to be in all respects equal"); *infra* at 18 (discussing opposition to diverse property qualification). In later referring to the "material diversity" within Congress

and in those few instances when the Framers thought a rule necessary and uniformity impossible—*e.g.*, the qualifications of electors or the standards for residency—they made an explicit and circumscribed delegation of the subject to the States.[13]

Viewed in its historical context, the deletion of the rotation provision was a fully informed, deliberate rejection of the concept. The Framers were well-acquainted with term limits, which, then as now, were popular in some quarters. Ten state constitutions included rotation requirements for a variety of state legislative and executive offices and/or for delegates to the Congress created by the Articles of Confederation, and the Articles themselves provided for rotation.[14] Moreover, many delegates had experienced term limits first-hand. James Madison had been barred from additional service in Congress, and other delegates had had similarly unfavorable experiences. WARREN at 613. Only a few years prior to the Convention, reformers in Virginia led by Madison and in Pennsylvania led by Wilson and Robert Morris had begun attacking state rotation requirements "as leading to instability and confusion" in government and "depriv[ing] [the people] of the right of choosing those persons whom

(*see* Term Limits Br. at 36 n.54), Hamilton referred to the "*disposition* [of] . . . representatives towards the different ranks and conditions in society," not to the *rules* governing their qualifications for membership in the national legislature. *See* THE FEDERALIST No. 60, at 367 (emphasis added).

[13] In the case of electors, Wilson noted that "[i]t was difficult to form any uniform rule of qualifications for all the States." 2 FARRAND 201. Madison later explained that a "uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention." THE FEDERALIST No. 52, at 326. *See also Tashjian* v. *Republican Party*, 479 U.S. 208, 227-28 (1986) (summarizing Convention debate). As several delegates noted, residency was also a hotly disputed concept in the States. 2 FARRAND 217 (Madison, G. Morris, Mercer).

[14] *See* State App. 3b, 5b, 6b-7b, 14b, 19b, 20b, 22b-24b, 27b, 31b and 34b (citing state constitutions); App. 1a (Article V of the Articles of Confederation).

they would prefer." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 at 436, 439 (1969) (hereinafter "WOOD").

Given the growing controversy surrounding rotation and the extensive debate over other qualification provisions (see *infra* at 17-19), it is inconceivable that, without a single word on the subject, the Framers deleted the rotation clause in order to confer authority on the States to adopt 13 different term limit rules. When they intended to leave regulation of a qualification to the States, the Framers did so expressly. And, in stark contrast to property qualifications, where significant differences in state economies produced widely divergent property ownership requirements (see *infra* at 16-17 & n.15), no regional distinctions rendered a uniform rule on rotation difficult to formulate, as the Articles of Confederation themselves attest.

Comments the delegates made on related subjects, moreover, make clear their understanding that they had eliminated rotation from the federal legislative scheme. During debate on a term limit for the President, for example, Gouverneur Morris noted that if, as proponents claimed, rotation was "the palladium of Civil liberty," the concept should be applied to the Legislature as well. "[Y]et no one," he said, had "conceived that the members of it should not be re-eligible." 2 FARRAND 120. Speaking in early opposition to property qualifications, Dickinson stated that it was "improper that any man of merit should be subjected to disabilities in a Republic where merit was understood to form the great title to public trust, honors & rewards." *Id.* at 123. These statements, which petitioners ignore, cannot be reconciled with their contention that the Framers understood States to have the authority to impose a patchwork quilt of rotation and other restrictions on who could serve as a federal legislator.

Property Requirements and Debtor Status. Elimination of rotation, moreover, was consistent with the Framers' rejection of other then-prevalent qualifications. In 1787, nearly every state constitution included a property qualification for state legislators, with the amounts varying

widely from state to state.[15] Similarly, the constitutions of all but two States established religious qualifications for state legislators, which, as the Framers had reason to know, rendered Catholics, Jews and even members of some Protestant denominations ineligible for office. See WARREN at 425-26. The failure to include these then-common qualifications in the federal Constitution reflected a conscious rejection of obstacles to federal office.

In attempting to prove otherwise, petitioners argue that the Framers rejected property qualifications either because they opposed giving *Congress* the authority to establish the qualification (Term Limits Br. at 39-40) or because they opposed a uniform rule. State Br. at 43. The debates surrounding this proposal, however, flatly refute these claims.

Noting that the Committee of Detail had "reported no qualifications because they could not agree on any" (2 FARRAND 249), John Rutledge proposed on August 10th "that the qualifications *should be the same as for members of the State Legislatures.*" *Id.* at 251 (emphasis added). Oliver Ellsworth, a strong state-rights proponent, likewise proposed to delegate property qualifications for federal legislators to the States.[16] Although, just three days earlier, the Convention had agreed to leave the qualifications of electors to the States for precisely the same reason—*i.e.*, the difficulty of agreeing on a uniform rule (see n.13, *supra*)—no delegate seconded these proposals. Nor did anyone suggest that such a proposal was unnecessary be-

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[15] In South Carolina, a state senator had to own a freehold of at least 2000 pounds, while Delaware required only that its representatives be freeholders. *See* State App. 2b, 31b.

[16] Ellsworth argued that it was "improper to have either *uniform* or *fixed* qualifications[,]" and that "it was better to leave this matter to the Legislative discretion than to attempt a provision for it in the Constitution." 2 FARRAND 249 (emphasis in original). His endorsement of *varying* qualifications, and his proposal to eliminate any provision in the Constitution, necessarily entailed leaving the matter to the States. *See* WARREN at 419 (so interpreting Ellsworth's statement).

cause States already possessed such authority. The Convention thus failed to adopt an explicit proposal that would have conferred on the States the very authority that petitioners claim was so obvious that the Framers never "questioned" its existence. Term Limits Br. at 42.

The Convention did so, moreover, for reasons that are antithetical to state-imposed term limits. Rutledge and Ellsworth aside, proponents of such a requirement urged that Congress be authorized to "establish such *uniform* qualifications of the members of each House, with regard to property." 2 FARRAND 248 n.6 (emphasis added). Opponents led by Franklin argued that there should be no property qualification at all. Others, led by Madison, objected to leaving the matter to Congress, not because it was the *wrong* body, but because *no* institution should have such power. According to Madison, the qualifications of representatives "were fundamental articles in a Republican Govt. and ought to be *fixed by the Constitution.*" *Id.* at 249-50 (emphasis added).[17] Each reason is incompatible with the reservation of state authority to impose qualifications.

The Framers also rejected proposals to exclude "Pensioners" and "such persons as are indebted to, or have unsettled accounts with the United States." 2 FARRAND 117. Supporters of these proposals noted that in many States, debtors had become members of the legislatures in order to promote laws that sheltered their delinquencies. *Id.* at 121 (Mason). Nevertheless, numerous delegates argued against the proposals because they would exclude too many people from legislative service. See *id.* at 125-27 (Gorham, Langdon, Wilson, G. Morris, Ellsworth, and Pinckney). As Wilson noted, the Convention was "providing a Constitution for future generations, and not

[17] The dangers Madison associated with a legislative power to establish qualifications are by no means limited to Congress. His concern that "[q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of a weaker faction" (2 FARRAND 250 (internal citations and brackets omitted)) applies as much to state as to federal authority to prescribe qualifications for federal legislators.

merely for the peculiar circumstances of the moment" (*id.* at 125), an observation plainly at odds with any scheme conferring open-ended authority on the States to add whatever measures "the peculiar circumstances of [future] moment[s]" might suggest to them.

The history surrounding the Convention's rejection of various qualifications[18] thus completely belies petitioners' claims that the Constitution establishes only a qualifications floor to which the States may add as they see fit. State Br. at 36-37. The absence of requirements based on property, solvency, and nonincumbency were the product of often extensive debate, negotiation and compromise. For a State to add qualifications based on property ownership or non-incumbency would inescapably alter the balance the Framers consciously struck.[19]

[18] Despite their prevalence, the Convention never even considered a religious qualification for Congress. The Framers later added a clause prohibiting religious tests (*see* art. VI, cl. 3), not because they believed *States* would otherwise be free to impose such requirements (State Br. at 38; Term Limits Br. at 49), but to ensure that the Constitution's "oath" requirement did not itself create a religious test. *See* 2 FARRAND 342, 468 n.24. Nor was such a concern unfounded. The South Carolina ratifying convention proposed that the prohibition be amended to provide that "no *other* religious Test" could be prescribed. "The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 556 (Bernard Bailyn ed., 1993) (hereinafter "BAILYN") (emphasis added).

[19] This exclusivity is likewise confirmed by the history of the citizenship qualifications the Framers did adopt. On August 9th, the delegates debated whether the period of citizenship for Senators should be 4, 10, 13, or 14 years before they settled on a 9-year period. 2 FARRAND 235-39. Four days later, they debated 3, 7 and 9-year periods of citizenship for members of the House, as well as a proposal to leave the matter entirely to Congress, before fixing the period at 7 years. *Id.* at 268-69. It is clear from the debates that the 7 and 9-year periods of citizenship are ceilings as well as floors, and that States have no authority to add additional years of citizenship.

2. *The Framers Rejected State Control Over Federal Legislators.*

Throughout their briefs, petitioners suggest that *States* have representatives, and that Members of Congress represent the *State's* interest in the national legislature. Term Limits Br. at 25, 42; State Br. at 40. From this they reason that the States must have the right to dictate who can represent them in Congress. The Framers, however, envisioned no such system.

Addressing the question of congressional compensation, Madison proposed on June 12th that the amount be fixed in the Constitution, noting that "it would be improper to leave the members of the Natl. legislature to be provided for by the State Legisls.: because it would create an improper dependence." 1 FARRAND 215-16. The delegates then voted that congressional salaries should be paid out of the National Treasury. *Id.* at 216. When, on June 22nd, Ellsworth re-opened the issue, Randolph, King, Wilson, Madison and Hamilton all strenuously opposed state funding. As Randolph put it, "[If] the States were to pay the members of the Natl. Legislature, a dependence would be created that would vitiate the whole System. *The whole nation has an interest in the attendance & services of the members.*" *Id.* at 372 (emphasis added). Wilson likewise "thought it of great moment that the members of the Natl. Govt. should be left as independent as possible of the State Govts. *in all respects.*" *Id.* at 373 (emphasis added and brackets omitted). Ellsworth's motion was defeated (*id.* at 374), as was his later attempt to provide for state payment of Senators. *Id.* at 427-28.

Nevertheless, the report prepared by the Committee of Detail provided that the compensation for members of both Houses would be controlled by the States. 2 FARRAND 180. During the debates that led to the elimination of this provision, most of the delegates who spoke (including, surprisingly, Ellsworth) opposed the measure because of the undue influence it would permit States to

exercise over Congress. See *id.* at 290-92 (Ellsworth, Langdon, Madison, Gerry, Mason, Carroll and Dickinson). In response to Luther Martin's argument that Senators should be paid by the States because they represent them, Daniel Carroll argued that "[t]he Senate was to represent & manage the affairs of the whole, and not to be the advocates of State interests." *Id.* at 292.

In light of these efforts to free Congress from dependence upon the States, the notion that States can "set qualifications for their congressmen," and have "power over their characteristics" (State Br. at 40) would have been entirely repugnant to the Framers. Nor would the repugnance be lessened by the fact that, in this case, a majority of Arkansas voters, rather than the Arkansas legislature, adopted Amendment 73. The Framers denied States authority to set qualifications and limited their influence over federal legislators not because they believed state legislatures failed to reflect the will of their people, but because they believed state legislatures were too attentive to local views and thus too parochial in their approach to national problems.[20] The reasons for preventing state interference, therefore, apply equally to popularly enacted as well as legislatively enacted state measures. Indeed, while the Framers frequently noted the importance of allowing the people to *choose* representatives, they no-

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[20] As early as July 1780, Washington wrote that, under the Articles of Confederation, "our measures are not under the influence and direction of one council, but thirteen, each of which is actuated by local views and politics[.]" 19 THE WRITINGS OF GEORGE WASHINGTON 132 (John C. Fitzpatrick ed.). Randolph summarized the well-known results of this parochialism at the opening of the Convention. 1 FARRAND 19. Although Wilson suggested that state opposition to federal measures resulted "*more* from the Officers of the States, than from the people at large" (*id.* at 49 (emphasis added)), it was understood that "the problems of the 1780s were . . . . due to the legislatures' very representativeness." WOOD at 409-10. As Madison explained, "[t]he necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest [*i.e.*, those of the union] at the expense of their local conveniency or prejudices." 2 FARRAND 240.

where suggested that the people could *disqualify* persons from service in the federal legislature.

3. *Edmund Randolph's Notes From the Committee of Detail Do Not Demonstrate That the Qualifications Prescribed by the Constitution Are Not Exclusive.*

Against this compelling evidence that the Constitution establishes the exclusive qualifications for members of Congress, petitioners ask this Court to place critical weight on language that appears in Edmund Randolph's notes from the Committee of Detail. Formed in late July, this Committee was assigned the task of bringing together in one document the various agreements the delegates had reached during the first two months of debate. 2 FARRAND 95. Randolph's notes, which historians surmise may have been the first draft of the Committee's report,[21] included the following phrase: "(and any person possessing these [previously recited] qualifications may be elected except)." *Id.* at 139. Claiming that this parenthetical phrase would have rendered the Qualifications Clauses exclusive, petitioners note that the phrase was not included in the Committee's report to the full Convention. From this they conclude that the entire Convention rejected a recitation in the Constitution of exclusive qualifications.

This evidence cannot possibly bear the extraordinary weight petitioners place on it. Most critically, the unexplained actions of the Committee cannot be ascribed to the Convention generally. The evolution of Randolph's notes, and their relationship to drafts prepared by Wilson, is essentially unknown, and there is no record of the five-member Committee's proceedings or the reasons for the numerous changes they made.[22] What is clear, however,

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[21] *See* 1 FARRAND xxiii n.36 (describing the document petitioners cite as "[a]n early, *perhaps* the first, draft of the committee's work") (emphasis added).

[22] The most plausible explanation for the deletion is that the Committee thought the parenthetical phrase redundant. At the time, four state constitutions recited exclusive qualifications in the same negative language (WARREN at 422-23 n.1) that appears in Wilson's first draft of the Committee's report (*see* 2 FARRAND 153 (showing deletion of the phrase "No person shall be capable of being chosen")), and that was later used in the federal Constitution. Wilson was from one of those states (Pennsylvania), as was the Committee Chairman, John Rutledge (South Carolina). Because the language in the Committee's final report is identical to that in Wilson's first draft (*compare id.* at 153 *with id.* at 178), it is possible that Wilson himself deleted the phrase as superfluous.

is that the Convention as a whole did not debate or modify any of the Committee's initial or interim drafts, only its final report. Thus, even in the unlikely event that the *Committee* intended to reject exclusivity,[23] that intention was never conveyed to, let alone approved by, the entire Convention.

In fact, most of the debates over property qualifications and length of U.S. citizenship took place *after* the Committee released its report. Notwithstanding repeated statements and actions revealing the Convention's intention to establish a uniform and exclusive set of qualifications, no member of the Committee so much as hinted that it proposed to resolve the matter differently. Indeed, if the Committee had purposely rendered the qualifications non-exclusive and thereby authorized States to establish additional requirements, Rutledge and Ellsworth would not have proposed leaving property qualifications to the States. Both were members of the Committee of Detail and would have understood that such a delegation would occur as long as the Constitution included no provision on the subject. Their statements and actions reveal plainly that this was not their understanding.

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[23] Because it is only the *deletion* of the parenthetical phrase that gives rise to the inference petitioners draw, and because no such language was deleted from the clause concerning the Senate, petitioners' argument leads to the implausible conclusion that the qualifications for members of the House are not exclusive, whereas those for Senators are.

B. The Ratification Debates Confirm That States Have No Authority To Limit The Terms Of Members Of Congress.

The extensive debate preceding the ratification of the Constitution is utterly fatal to petitioners' claims. Statements made during the ratifying conventions and in hundreds of letters, newspaper editorials, and pamphlets confirm that opponents and supporters alike understood that the qualifications set forth in the Constitution were exclusive, and could be augmented only through amendment of that document itself.

1. *Opponents and Supporters Alike Understood That Rotation Had Been Excluded From the Constitution.*

Numerous opponents of ratification identified the lack of a rotation requirement as one of the Constitution's principal defects. Like term limits proponents today, critics argued that rotation was necessary to prevent the growth of a class of politicians who "probably will be continued in office during their lives" and would soon lose touch with the people.[24] Nor was this criticism limited to opponents.

[24] "Reply to Wilson's Speech: 'An Officer of the Late Continental Army,'" *Independent Gazeteer* (Phil., Nov. 6, 1787) (attributed to William Findley), 1 BAILYN 97, 100; *see also* Samuel Bryan, "Centinel I," *Independent Gazeteer* (Phil. Oct. 5, 1787), 1 BAILYN 52, 61 ("as there is no exclusion by rotation, [Senators] may be continued for life, which, from their extensive means of influence, would follow of course"); Samuel Bryan, "Centinel II," *Freeman's Journal* (Phil., Oct. 24, 1787), 1 BAILYN 77, 86 (same); Letter of George Lee Turberville to Madison (Dec. 11, 1787), 1 BAILYN 477, 479 ("[w]hy was not that truely republican mode of forcing the Rulers or sovereigns of the states to mix after stated Periods with the people again-observed"); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1836) (hereinafter "ELLIOT") (Mass., Turner) ("[k]nowing the numerous arts, that designing men are prone to, to secure their election, and perpetuate themselves, it is my hearty wish that a rotation may be provided for"); *id.* at 62 (Mass., Kingsley) ("we are deprived of annual elections, have no rotation, and cannot recall our members; therefore our federal rulers will be masters and not servants"); Mercy Otis Warren,

In a letter to James Madison, Thomas Jefferson identified as "[t]he second feature I dislike, and greatly dislike, is the abandonment in every instance of the necessity of rotation in office." Letter of Jefferson to Madison (Dec. 20, 1787), 1 BAILYN 209, 211.[25]

Despite the uncertain prospects of the Constitution in a number of States, supporters never suggested that this "defect" was illusory because States could impose rotation on members of Congress. To the contrary, supporters argued that mandatory rotation abridged the people's right to choose their leaders. In New York (where ratification was perhaps most uncertain), Robert Livingston argued that

> [t]he people are the best judges who ought to represent them. To dictate and control them; to tell them who they shall not elect, is to abridge their natural

"A Columbian Patriot" (Boston, Feb. 1788), 2 BAILYN 284, 292 ("[t]here is no provision for a rotation, nor any thing to prevent the perpetuity of office in the same hands for life. . . . By this neglect we lose the advantages of that check to the overbearing insolence of office, which by rendering him ineligible at certain periods, keeps the mind of man in equilibrio, and teaches him the feelings of the governed"); 2 ELLIOT 287-88 (N.Y., G. Livingston) (Senators will enjoy "a security of their re-election, as long as they please. . . . In such a situation, men are apt to forget their dependence, lose their sympathy, and contract selfish habits. . . . The senators will associate only with men of their own class, and thus become strangers to the condition of the common people"); *id.* at 309-10 (N.Y., Smith) ("there is no doubt that the senators will hold their office perpetually; and in this situation, they must of necessity lose their dependence, and attachment to the people").

[25] As petitioners note, 30 years later Jefferson changed his views. *See* Term Limits Br. at 48. In 1787 and 1788, however, no writer shared Jefferson's later view that States could impose a rotation requirement. It is worth noting, too, that, despite his brilliance, Jefferson was very often famously wrong in constitutional matters. He thought, for example, that a national bank was unconstitutional (*compare* 5 THE WRITINGS OF THOMAS JEFFERSON 284-89 (Paul Leichester Ford ed., 1895) (letter of Jefferson to Washington on the bank's constitutionality) *with McCulloch* v. *Maryland*, 17 U.S. 316 (1819)) and that he could fire John Marbury. *See Marbury* v. *Madison*, 5 U.S. 137 (1803).

> rights. This rotation is an absurd species of ostracism. . . . We all know that experience is indispensibly necessary to good government. —Shall we then drive experience into obscurity. I repeat, that this is an absolute abridgement of the people's rights.

2 ELLIOT 292-93.

The people themselves, defenders argued, had the right to "recall" or "rotate" their representatives through their franchise. As George Washington wrote:

> The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own chusing; and whenever it is executed contrary to their Interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled.

Letter of G. Washington to B. Washington (Nov. 10, 1787), 1 BAILYN 305, 306-07. Indeed, while the Arkansas Amendment deplores the fact that elected officials are "preoccupied with reelection," Washington's comments, like dozens of others, reflect the Framers' belief that the desire for re-election ensures that representatives will remain responsive to their constituents. See, *e.g.*, THE FEDERALIST No. 57, at 352 (James Madison) (frequent elecitons "support in the members [of the House] an habitual recollection of their dependence on the people"). And while petitioners contend that the Framers expected members of Congress to limit their terms voluntarily (see State Br. at 18-19; Term Limits Br. at 40), the Framers cited the possibility of re-election and extended tenure as a benefit. Wilson argued that "the people at large will acquire an additional privilege in *returning* members to the house of representatives" ("James Wilson's Speech at a Public Meeting," (Phil. Oct. 6, 1787), 1 BAILYN 63, 67 (emphasis added)), and Madison argued that foreign policy would be more secure under the Constitution because "the same members [of the Senate] are re-eligible from time to time, [and] the danger from a change [in their membership] may possibly not happen during the lives of the

members." Letter of Madison to G. Nicholas (May 17, 1788), 2 BAILYN 443, 446.[26]

Most tellingly, opponents who found these answers unsatisfactory recognized that their only recourse was to amend the Constitution itself. At the New York ratifying convention, Gilbert Livingston proposed an amendment that would have prevented individuals from serving two consecutive terms in the Senate. 2 ELLIOT 289. Debate over the proposal reveals that proponents and opponents shared two basic assumptions: the amendment would add a new qualification to those prescribed in the Constitution, and such an addition required an amendment of the Constitution.

Melancton Smith, a principal term limit proponent, defended the amendment on the ground that it constituted no greater an abridgement of the right to vote than the qualifications of Article 1. "What is the whole system of qualifications," he argued, "but a restraint? Why is a certain age made necessary? [W]hy a certain term of citizenship?" *Id.* at 311. And, even though the amendment concerned Senators, who were appointed by the State legislatures, no one suggested that the States had any inherent authority to impose such a restraint on their own. Hamilton observed that "[t]here is no probability that we shall ever persuade a majority of the states to agree to this amendment." *Id.* at 320. Accepting the necessity of such persuasion, Smith simply responded that such an endeavor might not be as difficult as Hamilton supposed. *Id.* at 323-24.

These same assumptions were reflected in other ratifying conventions. In Virginia, delegates "recommended to

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[26] Madison also recognized that long-term incumbency might entail certain dangers, but he did not suggest that the States could unilaterally remedy them. In THE FEDERALIST No. 53, he noted that "[a] few of the members [of the House], as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages." *Id.* at 335.

the consideration of the Congress which shall first assemble" (2 BAILYN 558), various amendments, one of which was that members of the House and Senate "should at fixed periods be reduced to a private station, [and] return into the mass of the people." See App. 9a. The North Carolina convention attached an identical rotation amendment (App. 10a), and Pennsylvania proposed an amendment allowing state legislatures to recall Senators at any time. 2 ELLIOT 545.

Only by turning a blind eye to this history can petitioners make the remarkable assertion that no opponent of the Constitution "suggested that the States were being denied the power to set qualifications." Term Limits Br. at 42. Those on both sides of the ratification debates plainly understood that the Constitution barred States from adding a rotation requirement, and that such a qualification could only be added by constitutional amendment.

2. *The Ratification Debates Reflect a Universal Understanding That the Qualifications Prescribed by the Constitution Were Exclusive.*

The ratification debates also disclose a universal understanding that the qualifications prescribed by the Constitution were exclusive and that, as a result, the door to congressional office had purposely been left open to virtually all.

Numerous writers applauded the absence of a property qualification. Noah Webster wrote approvingly that "money is not made a requisite—the places of senators are wisely left open to *all* persons of suitable age and merit." N. Webster, "A Citizen of America," (Phil., Oct. 17, 1787), 1 BAILYN 129, 142 (emphasis added). Timothy Pickering, who later served in both the House and Senate, noted that, "while several of the state constitutions prescribe certain degrees of property as indispensable qualifications for offices, this which is proposed for the U.S. throws the door wide open for the entrance of *every* man who enjoys the confidence of his fellow citizens." Letter of T. Pickering to C. Tillinghast (Dec. 24, 1787), 1 BAILYN 289, 290 (emphasis in original). And, in a passage that described his own ascent from impecunious origins, Hamilton wrote that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. *The door ought to be equally open to all.*" THE FEDERALIST No. 36, at 217 (emphasis added).

Seeking to win ratification in closely divided New York, defenders emphasized that the absence of other qualifications was intentional and beneficial. "No Government[] that has ever yet existed," John Stevens, Jr., wrote in December 1787, "affords so ample a field, to individuals of all ranks, for the display of political talents and abilities. . . . No man who has real merit, let his situation be what it will, need dispair." J. Stevens, Jr., "Americanus V," *Daily Advertiser* (New York, Dec. 12, 1787), 1 BAILYN 487, 492. In THE FEDERALIST NO. 52, Madison wrote that the qualifications of legislators "have been very properly considered and regulated by the convention." *Id.* at 326. Reciting the qualifications set forth in Article I, he explained that, "[u]nder these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Id.* Less than two weeks later, he made clear that additional qualifications could not be added:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, or religious faith, or of civil profession, is *permitted* to fetter the judgment or disappoint the inclination of the people.

THE FEDERALIST NO. 57, at 351 (emphasis added). And during the debates at the New York convention, Hamilton emphasized that "the true principle of a republic

is, that the people should choose whom they please to govern them." 2 ELLIOT 257.

Delegates at other ratifying conventions likewise recognized that the Constitution prescribed exclusive qualifications. The Massachusetts convention rejected an attempt to add a property qualification after Rufus King, a delegate to the Constitutional Convention, explained that such a measure had been considered and rejected by the drafters. *Id.* at 35-36. In Virginia, Wilson Carey Nicholas refuted charges that the Constitution violated democratic principles: "very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence." 3 ELLIOT 8.

Once again, petitioners simply ignore this evidence. Instead, they focus on Hamilton's famous statement that "[t]he qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature." THE FEDERALIST No. 60, at 371. According to petitioners, because Hamilton referred only to Congress, he necessarily implied that *state* legislatures could add whatever qualifications they wished. State Br. at 45; Term Limits Br. at 43-44.

Petitioners' assertion, however, cannot be reconciled with Hamilton's earlier statement—echoed or presaged by numerous other defenders of the Constitution—that the door to congressional office had been left open to all who possessed the minimal qualifications. It is simply inconceivable that any of these writers thought this important principle—safeguarded from congressional interference—was nevertheless subject to veto or complete subversion by the 13 state legislatures, and no opponent of the Constitution suggested otherwise.

C. The Actions Of The Early Congresses Reflect A Recognition That Additional Qualifications Could Be Imposed Only By Amending The Constitution.

1. *The First Congresses Sought to Add Qualifications Through Constitutional Amendment.*

In a remarkable distortion of the historical record, the State attempts to prove that the Constitution's qualifications are not exclusive by pointing to the fact that "mandatory rotation proposals were advanced shortly after the First Congress convened." State Br. at 22. The State fails to disclose the most salient feature of these proposals: they were proposed *constitutional amendments*, not statutes.[27] Indeed, these proposed amendments were followed by four others introduced in the Second, Ninth, Tenth and Twenty-Fourth Congresses. 3 ANNALS OF CONG. 663 (Gales and Seaton eds., 1793) (officers and stockholders of the Bank of the United States to be ineligible for congressional office); 15 ANNALS OF CONG. 880-92 (Gales and Seaton eds., 1806) (government contractors ineligible); 18 ANNALS OF CONG. 1714-18 (Gales and Seaton eds., 1808) (same); CONG. GLOBE, 24th Cong., 1st Sess. 165 (1836) (same). Like the state ratifying conventions, the earliest Congresses plainly understood that additional qualifications could be imposed only through amendment of the Constitution itself, not by legislative fiat.

The four statutes Congress passed between 1789 and 1792 are consistent with this understanding. As petitioners note, all four disqualified offenders from holding

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[27] Rep. Tucker proposed that the following words be added to the end of Article I, Section 2, Clause 2: "'[n]or shall any person be capable of serving as a Representative more than six years in any term of eight years'"; and that the following be added to the end of Article I, Section 2, Clause 3: "'[f]rom and after commencement of the year 1795, the election of Senators for each State shall be annual, and no person shall be capable of serving as Senator more than five years in any term of six years.'" 1 ANNALS OF CONG. 761 (Joseph Gales ed., 1789).

"any office under the United States" or "any office of honour, trust or profit under the government of the United States." [28] What petitioners fail to mention, however, is that this disqualification did *not* extend to *congressional* office. Construing identical language used in one of the Reconstruction era statutes petitioners cite to prove that Congress may add qualifications, this Court ruled in *Burton* v. *United States* that this language does *not* require a convicted Senator to vacate his seat (202 U.S. 344, 369-70 (1906)), and thereby rejected the argument that the act "superadds disqualifications to those expressly contained in the Constitution." *Id.* at 351.[29] Nor do petitioners attempt to reconcile their reading of these statutes with their own recognition—and, more importantly, this Court's holding in *Powell* v. *McCormack* —that Congress lacks the authority to add qualifications to those enumerated in the Constitution. See Term Limits Br. at 44; State Br. at 45.

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[28] *See* Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67; Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281; Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117; Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 298. This language appears in all but two of the twenty-six later federal statutes petitioners cite. *See* Term Limits App. 25a-42a. The two provisions that refer to "a position in the Government of the United States" are from the Civil Service laws (Title 5) and plainly refer to civil service positions in the federal government.

[29] Although petitioners disparage the Court's reasoning (Term Limits Br. at 32 n.49), the distinction the Court drew between Members of Congress and "person[s] holding office under the United States" is confirmed by the Constitution itself (*see* art. I, § 6, cl. 2; art. II, § 1, cl. 2) as well as by the statutes petitioners cite. *See* Act of July 16, 1862, ch. 180, 12 Stat. 577-78 (referring to "any member of Congress *or* any officer of the government of the United States" convicted) (emphasis added). In all events, the *Burton* Court's determination that the disqualification does not include congressional office has never been disturbed and no court has construed the statutes in which this language appears to disqualify persons from congressional office.

2. *The Maryland Election Debates Reveal That Congress Deemed State-Imposed Qualifications to Be Constitutionally Impermissible.*

The recognition of the early Congresses that the Constitution establishes exclusive qualifications is likewise reflected in the House of Representatives' disposition of an 1806 election dispute resulting from William McCreery's failure to satisfy Maryland's district residency requirement. Ignoring the factual dispute over McCreery's actual place of residence, the House Committee of Elections reported that it had "proceeded to examine the Constitution, and [found] that qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications." 17 ANNALS OF CONG. 871 (Gales and Seaton eds., 1807). The Committee Report concluded that Maryland's additional residency requirement "is contrary to the Constitution of the United States" and resolved that Representative McCreery should be seated.[30]

Before the House Committee of the Whole, the Chairman of the Elections Committee explained that "[t]he Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them." *Id.* at 872. After extensive debate in which members on the losing side offered the same reasons presented

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[30] Petitioners' reliance on early State laws that purported to add district residency requirements (*see* Term Limits App. 12a-18a) is thus misplaced, inasmuch as the first of these to be challenged was deemed invalid. Indeed, within a few years thereafter, both North Carolina and Virginia repealed their district residency requirements. *See* 1812 N.C. Laws, ch. 6; 1813 Va. Act, ch. 23. Moreover, it is only the actions of the First Congress, not those of early state legislatures, that provide "weighty evidence" of the Constitution's meaning. *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

by petitioners here, the Committee of the Whole voted to seat Representative McCreery. There is no question that the House Committee made its decision on constitutional grounds. While that Committee is not an Article III court, its decision was reviewed and relied upon by this Court in *Powell* v. *McCormack*.[31]

III. THIS COURT'S PRECEDENTS CONFIRM THAT THE QUALIFICATIONS PRESCRIBED BY THE CONSTITUTION ARE EXCLUSIVE.

Finally, this Court's precedents confirm what the language, structure and history of Article I make clear. In *Powell*, this Court addressed whether courts could review a House determination that an individual was " 'unqualified' to sit as a member because he had been accused of misappropriating public funds and abusing the process of the New York courts." *Nixon* v. *United States*, 113 S. Ct. 732, 739 (1993) (quoting *Powell*, 395 U.S. at 519). The issue of justiciability in *Powell* thus turned on whether the Constitution's specified qualifications for members are exclusive, or whether they constitute a mere baseline to which other qualifications may be added. In holding that Congress' power under Article I, Section 5 allowed it "to judge only the qualifications expressly set forth in the Constitution" (395 U.S. at 548 n.34), *Powell* established that the only qualifications and disqualifications for membership in Congress are to be found in the Constitution, and that even a constitutional grant of authority to judge qualifications did not include the power to add any.

The Court recently affirmed this reading of *Powell* in *Nixon* v. *United States*. Distinguishing the justiciability of congressional action under the impeachment clause

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[31] Petitioners correctly observe that the resolution ultimately adopted by the House was simply to seat Rep. McCreery. State Br. at 47; 17 ANNALS OF CONG. 1061 (Gales and Seaton eds., 1807). It is obvious from the debates, however, that opponents of McCreery had lost the constitutional debate in the full House and, for this reason, forestalled a vote on it. *See id.* at 942 (statement of Rep. Randolph).

from congressional action under Section 5, the Court explained that "[o]ur conclusion in *Powell* was based on the *fixed* meaning of 'qualifications' set forth in Article I, Section 2. The claim [of] . . . textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the *only* qualifications which might be imposed for House membership." 113 S. Ct. at 740 (emphases added).

Petitioners attempt to dismiss *Powell* on the ground that it did not explicitly address whether qualifications can be added either through legislation (Term Limits Br. at 44) or by the States. *Id.*; State Br. at 45. These distinctions are unavailing. First, petitioners fail to recognize that Congress's authority under Section 5 is, if anything, broader than any "reserved" or implied power it or the States could possibly have over the composition of the national legislature. Section 5 is the *only* provision in the Constitution that delegates any authority at all to any entity concerning the qualifications of federal legislators. If the express grant of authority to judge the qualifications of Members of Congress does not include authority to prescribe qualifications, the States (and Congress) cannot derive greater authority from constitutional silence.

Second, Article I, Section 4 makes clear that Congress can enjoy no less authority than the States in this area. Under this provision, Congress is effectively empowered to sit as the legislature of individual States for the purpose of making or altering state election laws. Again, if, as petitioners acknowledge, Congress has no power to add qualifications through its own legislation, the States cannot possess such authority either. To hold otherwise would be to conclude that the Framers conferred through a veto right over state elections laws a power to add qualifications that they did not confer through an express constitutional grant of authority to judge qualifications. In sum, the reasoning in *Nixon* and the holding in *Powell* directly support the Arkansas Supreme Court's determination that Amendment 73 is unconstitutional.

IV. THE ARKANSAS TERM LIMITATION AMENDMENT ESTABLISHES AN UNCONSTITUTIONAL ADDITIONAL QUALIFICATION FOR MEMBERS OF CONGRESS.

Petitioners concede, as they must, that explicit term limitations, such as those enacted by some other States, impose additional qualifications on members of Congress.[32] Such initiatives are unconstitutional because they establish qualifications beyond the exclusive ones set forth in the Constitution itself. Although Arkansas Amendment 73 was indisputably enacted to establish term limits for members of Arkansas' congressional delegation, petitioners claim the Amendment is constitutionally permissible because it seeks to achieve its objectives by excluding incumbents from the ballot. Adoption of petitioners' premise that excluding persons from the ballot based on prior service is not an unconstitutional term limitation leads to absurd results. States would be free to impose a host of barriers to service in Congress—including requirements the Framers explicitly considered and rejected—as long as a write-in mechanism preserves the theoretical possibility that a person subject to the limitation might win an election. This contrived approach to the Constitution's prescription of qualifications completely subverts the important democratic principles the Framers so carefully enshrined, and is fundamentally at odds with all of the textual and historical evidence demonstrating that the regulation of legislative qualifications is committed exclusively to Article I itself.

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[32] Explicit term limitations meet even petitioners' proposed definition of "qualifications," *see infra* at 42, because they would exclude from office individuals who won elections but did not possess the qualification based upon prior service.

A. Under Article I, The Constitutional Validity Of Amendment 73 Depends Upon Its Purposes And Effect.

1. *The Purpose and Effect of Amendment 73 Confirm That It Is an Impermissible Qualification for Membership in the National Legislature.*

This Court and others consistently have judged the propriety of state laws affecting election outcomes by examining their purpose and effect. In fact, every lower federal and state court that has ever confronted state requirements that explicitly disqualified a class of individuals from serving in Congress has struck them down as unconstitutional. Thus, courts uniformly have invalidated felony disqualifications,[33] district residency requirements,[34] and similar requirements.[35] The courts' reasoning in strik-

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[33] *See Danielson* v. *Fitzsimmons*, 44 N.W.2d 484 (Minn. 1950); *State ex rel. Eaton* v. *Schmahl*, 167 N.W. 481 (Minn. 1918); *Application of Ferguson*, 294 N.Y.S.2d 174, 175-76 (N.Y. Sup. Ct.), *aff'd*, 294 N.Y.S.2d 989 (N.Y. App. Div. 1968).

[34] *See Exon v. Tiemann*, 279 F. Supp. 609, 613 (D. Neb. 1968); *State ex. rel. Chavez* v. *Evans*, 446 P.2d 445, 448 (N.M. 1968); *Hellmann* v. *Collier*, 141 A.2d 908, 911-12 (Md. 1958).

[35] *See Dillon* v. *Fiorina*, 340 F. Supp. 729, 731 (D.N.M. 1972) (two-year state residency requirement); *Shub* v. *Simpson*, 76 A.2d 332, 340-341 (Md. 1950) (disqualification of subversive persons); *In re O'Connor*, 17 N.Y.S.2d 758, 759-60 (1940) (disqualification of Communists). Although decisions that resign-to-run statutes are invalid under the Qualifications Clauses may no longer be good law in light of more recent authority (*compare State ex. rel Johnson* v. *Crane*, 197 P.2d 864 (Wyo. 1948); *Stockton* v. *McFarland*, 106 P.2d 328, 329-31 (Ariz. 1940); and *State ex. rel Chandler* v. *Howell*, 175 P. 569, 570 (Wash. 1918) *with Joyner* v. *Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Signorelli* v. *Evans*, 637 F.2d 853 (2d Cir. 1980); *cf. Clements* v. *Fashing*, 457 U.S. 957 (1982) (rejecting First Amendment challenge to resign-to-run provision)), the fact remains that every court to consider the question has concluded that States may not impose additional qualifications for membership in Congress. The recent resign-to-run decisions do not disagree with that principle, but have instead concluded that such laws regulate the integrity of state offices rather than impose qualifications for congressional office.

ing down such provisions has been uniform: States are precluded from adding to the requirements listed in the Qualifications Clauses.[36]

Beyond dispute, the purpose and effect of all of these requirements was to do exactly what the plain language of Amendment 73 says it does: render certain individuals ineligible to serve in Congress. None could be justified as a procedural regulation designed to ensure the integrity of the election process or to facilitate voter choice. Accordingly, because the purpose of these provisions was to exclude a class of individuals from serving in Congress, the provisions were invalidated.[37]

It is likewise clear that Arkansas Amendment 73 imposes an unconstitutional additional qualification. The Amendment's title is "The Arkansas Term Limitation Amendment." Its preamble states that:

> The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein *limit the terms of elected officials.*

Pet. App. 3a-4a. (emphasis added). The preamble does not refer to any state interest related to the integrity of the election process or that has been recognized by any court as promoting a candidate-neutral state interest. Rather, the avowed purpose of the Amendment is to manipulate election outcomes and to disqualify individuals with prior service from serving in the national legislature.

In contending otherwise, petitioners claim the Amendment is designed to serve a permissible state interest in leveling the playing field among congressional candidates. Term Limits Br. at 19-25; State Br. at 26-27. But this suggested purpose cannot be found in the preamble or elsewhere, and was not acknowledged by the Arkansas courts. To the contrary, the preamble states that the Amendment is designed not to level the electoral playing field, but to exclude incumbents from the stadium. Amendment 73 does not protect the integrity and fairness of the election process in a candidate-neutral way. The only rational purpose of Amendment 73 is to ensure that incumbents never—or almost never—win.

Even if its purpose were not so clear, the findings of the Arkansas courts eliminate any doubt as to the law's intent. See Pet. App. 15a ("[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service"); Pet. App. 49a ("[the Term Limitation] Amendment is purely and simply a restriction on the qualifications of a person seeking federal congressional office"). State court interpretations of state law are binding on this Court,[38] particularly where a state

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[36] The suggestion that this entire line of cases can be dismissed because the decisions "offer[] little analysis" (Term Limits Br. at 29 n.44) is inaccurate. Some courts analyzed the issue at great length. *See, e.g., Crane*, 197 P.2d at 867-74; *McFarland*, 106 P.2d at 329-31. Those that did not stated that the issue was "well settled" (*Fiorina*, 340 F. Supp. at 731), or noted that "[a]ll authorities . . . [were] in accord." *Fitzsimmons*, 44 N.W.2d at 486. Respondent is aware of no decision—and petitioners cite none—holding that States *are* permitted to create additional qualifications for members of Congress.

[37] This consistent line of cases belies the State's argument that its proposed definition of the term "qualification" is the only judicially manageable one. State Br. at 29. Courts have never had any trouble identifying additional qualifications that are incompatible with the Framers' intent. In any event, gains in efficiency obtained through loss of constitutional values is a plainly unacceptable method of constitutional analysis.

[38] *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2542 (1992); *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 339 (1986); *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 91 (1965). None of the narrow exceptions to this rule is applicable here. *See Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984) (rule is inapplicable when a state court's interpre-

court's determination is *adverse* to the State's interest in having its laws upheld as constitutional. *E.g., Reitman* v. *Mulkey*, 387 U.S. 369, 373-74 (1967). Moreover, it has long been the practice of this Court to defer to state court determinations of the intent of the state legislature,[39] and the logic of this rule applies equally to state court determinations concerning the purpose of state constitutional amendments. Because both state courts held that Amendment 73 is a term limits law, its status as such a law cannot be questioned before this Court.

Not only is the avowed purpose of Amendment 73 to dictate election outcomes, that will be its effect as well. As the Arkansas Supreme Court found, the Amendment effectively disqualifies individuals with prior service from congressional office because the possibility of winning re-election as a write-in candidate in Arkansas is a mere "glimmer[] of opportunity." Pet. App. 15a. This state court finding of fact is not reviewable. See, *e.g., Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952); *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925); *Portland Ry., Light & Power Co.* v. *Railroad Comm'n*, 229 U.S. 397, 441 (1913).[40]

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tation "has been influenced by an accompanying interpretation of federal law"); *Missouri ex rel. Wabash Ry.* v. *Public Serv. Comm'n*, 273 U.S. 126, 131 (1927) (the Supreme Court may consider "questions of state law arising after the decision below" was rendered).

[39] *See, e.g., Kingsley Int'l Pictures Corp.* v. *Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 688 (1959); *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924) ("[t]he task of determining the intention of the state legislature . . . like the usual function of interpreting a state statute, rests primarily upon the state court"); *Schneider Granite Co.* v. *Gast Realty & Inv. Co.*, 245 U.S. 288, 290 (1917).

[40] Petitioners claim this rule of deference is inapplicable here because the ruling below "[l]ack[ed] any evidentiary foundation," and is thus "one of law." Term Limits Br. at 18 n.22. But the state courts had before them an affidavit from Rep. Thornton concerning the impact exclusion from the ballot would have on incumbent candidates, and the Arkansas Supreme Court referenced as well the record in *Thorsted* v. *Gregoire*, 841 F. Supp. 1068 (D.

In any event, petitioners' assertion that the Arkansas Supreme Court's conclusion is "contrary to the record and historically incorrect" [41] (Term Limits Br. at 18) is meritless. This Court has acknowledged that a write-in opportunity "is not an adequate substitute for having the candidate's name appear on the printed ballot" (*Anderson* v. *Celebrezze*, 460 U.S. 780, 799 n.26 (1983)), and that " 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot." *Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974). In fact, only five write-in candidates have ever been elected to Congress. Out of approximately 1,300 Senatorial elections since passage of the 17th Amendment in 1913, only one Senator, Strom Thurmond in 1954, has been elected as a write-in candidate.[42] There have been approximately 32,400 elections to the House of Representatives since the founding of Congress, and approximately 20,000 during this century, when pre-printed ballots came into use, yet only four Representatives have ever been elected as write-ins, none of whom was an incumbent.

This glimmer of opportunity becomes chimerical upon examination of the facts behind the five successful write-in campaigns. Three of the five—Senator Thurmond in 1954, Representative Joseph Skeen in 1980, and Representative Charles F. Curry, Jr. in 1930—won only after

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Wash. 1994), and they concluded that, even with the write-in option, the effect of the Amendment is to preclude incumbents from serving in Congress.

[41] This assertion reveals an irreconcilable tension in petitioners' position. Conceding that the purpose of Amendment 73 is to prevent incumbents from staying in office, they contend that most well-known incumbents will often be successful getting re-elected via the write-in option. Term Limits Br. at 18 (citing affidavit of a political scientist). This attempt to justify the Amendment on the ground that it will not accomplish its stated purposes suggests that the supporters of the Amendment do not truly view the write-in option as a viable way for incumbents to get re-elected.

[42] These figures are derived from the United States Bureau of the Census, *Statistical Abstract of the United States* 275 (113th ed. 1993).

frontrunners died late in the race. Representative Packard conducted a successful write-in campaign in 1982 after coming in second in an 18-candidate Republican primary brawl in which the victor was widely accused of improper tactics. The successful write-in campaign took place in 1958 in Arkansas in the midst of the State's heated battle over public school desegregation. Dale Alford, a member of the Little Rock School Board who opposed integration, entered the race just one week before the election as a write-in candidate. He defeated eight-term Congressman Brooks Hays, who advocated gradual integration of the schools and had tried to mediate the conflict between the Governor and the federal government. In the absence of the unusual circumstances of these elections, no write-in candidate has ever been elected to Congress in this country.

In light of this history, the Arkansas Supreme Court correctly concluded that the availability of the write-in option does not alter the nature of the Amendment, which is to preclude individuals with a certain amount of prior service from serving in Congress.[43]

2. *Petitioners' Attempt to Define "Qualifications" Without Regard to Their Purpose and Effect Should Be Rejected.*

Recognizing that Amendment 73 cannot survive scrutiny under the foregoing analysis, petitioners propose another test. They contend that a requirement for congressional office is not an additional qualification if it does not exclude a candidate who captures a majority of the vote. Term Limits Br. at 16; State Br. at 30-31. This definition, however, is a mere contrivance that is funda-

[43] Petitioners also note that the Arkansas Supreme Court had before it an affidavit from a political scientist who opined that it is "far from impossible" for a write-in candidate to win. J.A. 201-04; Term Limits Br. at 18. The Arkansas Supreme Court obviously did not credit the affidavit, presumably because it contains sweeping statements about voter behavior and write-in candidacies, without any reference to studies or research conducted by the affiant or anyone else.

mentally incompatible with the central democratic principles embodied in the Constitution's prescription of a minimal, and exclusive, set of qualifications.

According to petitioners, as long as a State provides for write-in candidacies, the Constitution's prescription of qualifications is entirely irrelevant to the validity of state laws that exclude from the ballot persons between the ages of 35 and 40; persons who have not been citizens of the United States for at least ten years; foreign-born candidates; persons who do not meet solvency or property ownership tests; or persons not born within the State or who have not served in its legislature. Each requirement, like Amendment 73 itself, clearly undermines the wording and structure of Article I because, after vigorous debate, the Framers deliberately chose the precise age and citizenship requirements embodied in Article I, Sections 2 and 3; explicitly refused to adopt qualifications based upon property ownership, solvency and prior length of service; and made clear their commitment to uniform requirements. See *supra* at 13-19; see also 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 629 (4th ed. 1833) (if the States were to prescribe that a Representative should be forty years of age, and a citizen for 10 years, "the very qualification fixed by the Constitution [would be] completely evaded and indirectly abolished"). Yet, under petitioners' definition, none of these requirements is a qualification because none excludes from office any candidate who nevertheless manages to win the majority of the votes cast.

The text, structure and history of Article I cannot so easily be cast aside. Writing a century before the use of pre-printed ballots, the Framers could not have anticipated ballot access requirements. Nevertheless, in creating a new national legislature and prescribing the qualifications for its members, the Framers made unquestionably clear their commitment to two democratic principles: (1) the people should have an unfettered choice of who represents them, and (2) the door to the national legislature should be open to all who possess a few essential qualifi-

cations. Whether or not petitioners' definition of a "qualification" comports with 18th century dictionary definitions (see State Br. at 28 n.37), it makes a mockery of these principles, allowing them to be subverted through the transparent artifice of ballot exclusion.[44] Because the Constitution is to be read, "not as [a] . . . legislative code[] . . ., but as the revelation of the great purposes which were intended to be achieved by . . . a continuing instrument of government" (*United States* v. *Classic*, 313 U.S. 299, 316 (1941)), petitioners' proposed definition of the term "qualification" should be rejected.[45]

B. States Have No Authority Under Article I, Section 4 To Exclude Candidates From The Ballot Based On Prior Congressional Experience.

1. *The Times, Places and Manner Clause Was Never Intended to Permit States to Dictate Election Results.*

Even if Amendment 73 is not an additional qualification—and respondent believes it plainly is—it is a measure that States have no authority under the Times, Places, and Manner Clause to enact. Petitioners' contention that

[44] The fact that some of these restrictions might also violate the First or Fourteenth Amendments is irrelevant. At the time they drafted the qualifications set forth in the Constitution, these amendments did not exist, and the Framers thus could not have entrusted the protection of the people's right of choice to these safeguards.

[45] Contrary to petitioners' suggestion, the courts in *Joyner* v. *Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983), and *Public Citizen, Inc.* v. *Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993), did not base their decisions on petitioners' proposed test. Only the First Circuit, in *Hopfmann* v. *Connolly*, 746 F.2d 97, 103 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985), has purported to apply the test. Even in that case, however, the test was unnecessary because the law was a classic ballot access regulation that permitted only persons who received 15 percent of the vote on a state nominating convention ballot to run in a state primary. It is far from clear that the court would use this test to judge the propriety of a requirement explicitly designed "to limit the terms of elected officials."

this Clause empowers the States to "level the playing field" in order to equalize candidates' chances of electoral success is wholly contrary to the intent of the Framers.

In creating the national legislature, the Framers delegated to the States carefully circumscribed authority to perform necessarily local election functions. In describing this authority, no delegate mentioned that States might set additional qualifications or disable candidates from office. Madison referred instead to the latitude States had to decide

> [w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures.

2 FARRAND 240-41. It was these *procedural* regulations that he feared State Legislatures would "mould . . . as to favor the candidates they wished to succeed." *Id.* at 241; see also *id.* (G. Morris) (worrying that the "States might make false returns and then make no provisions for new elections").

Moreover, as petitioners note, Article I, Section 4 was "extremely controversial" during the ratification debates. Numerous critics vehemently denounced it, echoing Luther Martin's claim that it was "designed for[] the utter extinction and abolition of all state governments." 1 ELLIOT 361-62.[46] No fewer than seven state ratifying conventions passed resolutions asking the first Congress to amend the provision or forswear its use. See App. 2a-8a.

Plainly, opponents did not view this provision as a font of state authority to change or add to the qualifications set forth in the Constitution. Indeed, although it was the subject of extensive debate, petitioners do not cite a single instance in which anyone claimed that the

[46] *See also* 1 BAILYN 60, 100, 160, 236, 260-61, 428-29, 713, 896, 901, 927, 944.

provision authorized States to alter or add qualifications for congressional office. Nor did supporters, in attempting to placate the opposition, suggest otherwise. As the *Connecticut Courant* explained in 1788:

> The state Legislatures are to make the regulations and arrangements for the choice, and to make the privilege still more secure, these regulations are subject to the revision of the general Legislature. The constitution expressly provides that the choice shall be by the people, which cuts off both from the general *and state Legislatures the power of so regulating the mode of election, as to deprive the people of a fair choice.*

"The Republican," *Connecticut Courant* (Hartford, Jan. 7, 1788), 1 BAILYN 710, 713 (emphasis added).

Petitioners' limitless "level the playing field" rationale would have been unimaginable to the Framers. Under petitioners' theory, States can conclude that not only incumbency but unusual charisma, public speaking skills, fame derived from careers in the sports or entertainment fields, or great personal wealth should be counterbalanced. Similarly, States could adopt measures to handicap incumbents or candidates who are perceived to enjoy undue advantages by requiring that they win two-thirds or three-fourths of the votes cast.

Such interference would fly in the face of the Framers' conception of the limited power States were granted to regulate elections. And, because this provision empowers Congress to "make or alter" state election laws, petitioners' sweeping rationale would permit precisely the type of congressional manipulation of elections that Madison and Hamilton demonstrated was placed beyond Congress's authority by the Constitution's prescription of fixed legislative qualifications. Because States enjoy no greater authority under Article I, Section 4 than Congress, the demonstration Hamilton and Madison made is equally fatal to the sweeping state authority petitioners purport to derive from this same provision, particularly where

the authority claimed would thwart Article I's comprehensive design.

2. *Nothing in This Court's Ballot Access Decisions Suggests That States Have Authority to Dictate the Outcome of Federal Elections.*

This Court's decisions construing the Times, Places and Manner Clause are entirely faithful to this history. This Court has held that States may adopt "requirements as to *procedure* and *safeguards* which experience shows are necessary in order to enforce the fundamental right involved." *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932) (emphasis added). Contrary to petitioners' suggestion, the fundamental right is *not* the right to be governed by whomever the State, or anyone else, deems most "responsible and responsive." State Br. at 32. It is the right of the voter to vote for whomever he or she pleases. Accordingly, this Court has never suggested that States can deliberately manipulate the electoral chances of a particular group or class of candidates, much less handicap candidates on the ground that voters are too *likely* to re-elect them.[47]

Consistent with the States' purely procedural role under the Times, Places and Manner Clause, this Court has held that States may enact "generally applicable and even-handed restrictions that protect the integrity and reliability of the electoral process itself." *Anderson* v. *Cele-*

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[47] Petitioner's reliance on this Court's reapportionment decisions (Term Limits Br. at 23-25) is entirely misplaced. This Court has held that States may create congressional districts that are "aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved." *White* v. *Weiser*, 412 U.S. 783, 791 (1973). Term limitations, in stark contrast, *sever* relationships between congressmen and constituents who would like to re-elect them and destroy seniority. Far from demonstrating that States may counterbalance the advantages of incumbency, these cases indicate that States cannot interfere with incumbents' chances of winning elections because this interference is detrimental to voter choice.

brezze, 460 U.S. 780, 788 n.9 (1983). Thus, States may "require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Id.* at 788-89 n.9.[48] States may also protect the integrity of various routes to the ballot, by, for example, forcing candidates to make a binding choice from among those routes by a date certain, because such requirements prevent behavior that is unfair and that can yield results inconsistent with voter preferences. This Court's decision in *Storer* v. *Brown*, 415 U.S. 724 (1974), upon which petitioners place such heavy reliance, is an example of such an even-handed "affiliation" requirement.[49] Finally, States may require persons holding specified state and county offices to resign automatically if they run for congressional office, not because States can dictate election outcomes, but because they have a legitimate interest in controlling the conduct of their own employees and preventing corruption. *Cf. Clements* v. *Fashing*, 457 U.S. 957 (1982) (upholding a resign-to-run provision against First Amendment and Equal Protection challenges on the ground that States may legitimately regulate the conduct of state officeholders).[50]

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[48] *See, e.g., Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986) (upholding requirement that minor-party candidate receive at least 1% of the primary vote in order to appear on the general election ballot); *American Party* v. *White*, 415 U.S. 767 (1974) (upholding Texas scheme providing four methods for candidates to be placed on the general election ballot); *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971) (upholding requirement that nonparty candidates file nominating petitions signed by five percent of eligible voters).

[49] *See also Rosario* v. *Rockefeller*, 410 U.S. 752, 760-61 (1973) (upholding requirement that voter enroll with party of his choice 30 days before general election in order to vote in next primary because purpose of the requirement is to prevent disruptive party raiding).

[50] *See also Joyner* v. *Mofford*, 706 F.2d 1523, 1528 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983) ("[t]he burden on candidacy, imposed by [resign-to-run provisions], is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress"); *Signorelli* v. *Evans*, 637 F.2d 853, 859 (2d Cir. 1980) (resign-to-run is permissible because the "[State's] purpose is to regulate the [state office] that [appellant] holds, not the Congressional office he seeks").

The authority the State seeks to exercise in this case goes far beyond any this Court has recognized in its ballot access decisions. Amendment 73 does not prevent voter confusion or otherwise ensure the integrity or efficiency of the election process; it does not prevent manipulation of the various routes to the general election ballot; it serves no outcome-neutral state objective, such as preventing corruption. Rather than *protect* election procedures, the Amendment *manipulates* them in order to disable an identifiable class of persons from service in the federal legislature. Indeed, in stark contrast to traditional petition signature requirements, the Arkansas Amendment seeks to punish a class of persons not because they lack sufficient support in the electorate, but because they enjoy too much of it.

Accordingly, petitioner's suggestion that affirmance of the decision below will upset 200 years of state election laws is baseless. State-imposed term limitations on federal legislators represent a complete departure from the "comprehensive, and in many respects complex, election codes" that States have evolved during this country's history. *Storer*, 415 U.S. at 730. And, as demonstrated above, they likewise represent a complete departure from the prescriptions of the Constitution and the democratic principles the Framers sought to enshrine there.

* * *

Petitioners claim that they cannot conceive how a State's decision "not to return persons to Congress . . . after many years of incumbency is any more a threat to the constitutional structure than if the people decide in a particular election not to re-elect a particular individual." Term Limits Br. at 35. But in the latter circumstance, the people in a particular district have decided to choose someone else as their representative. Under the Arkansas

Amendment, the people of that district may be prevented from electing the person they wish to choose.

As the debates at the Constitutional Convention reveal, the Framers plainly understood the difference. Believing that the people should be permitted the widest possible latitude in choosing their representatives, the Framers drafted a Constitution that established only a minimal set of qualifications for federal legislators. If, after more than two centuries, this principle is to be changed and a new policy of limiting years of service is to be employed, such an alteration in the composition of the national government can be accomplished only through an amendment to the Constitution, not through a patchwork quilt of State laws.

CONCLUSION

For the foregoing reasons, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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October 17, 1994

APPENDIX

APPENDIX

ARTICLE V OF THE ARTICLES OF CONFEDERATION

Article V. For the more convenient management of the general interests of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state, to recal its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year.

No state shall be represented in Congress by less than two, nor by more than seven Members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office of the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the united states, in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

"The Articles of Confederation," 2 THE DEBATE ON THE CONSTITUTION 926, 927-28 (Bernard Bailyn ed., 1993).

RESOLUTIONS FROM THE STATE RATIFYING CONVENTIONS CONCERNING THE TIMES, PLACES AND MANNER CLAUSE

NEW YORK

Mr. SMITH moved, as an amendment, to add to the first resolution proposed by Mr. JAY, so that the same, when amended, should read as follows:—

"*Resolved,* as the opinion of this committee, that the Constitution under consideration ought to be ratified by this Convention: *upon condition, nevertheless,* . . . That the Congress will not make or alter any regulation in this state respecting the times, places, and manner of holding elections for senators or representatives, unless the legislature of this state should neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that, in those cases, such power will only be exercised until the legislature of this state shall make provision in the premises . . .["]

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 411 (Jonathan Elliot ed., 1836).

COMMONWEALTH OF MASSACHUSETTS

In Convention of the Delegates of the People of the Commonwealth of Massachusetts, 1788.

* * * *

And, as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of the commonwealth, and more effectually guard against an undue administration of the federal government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution:—

* * * *

Thirdly, That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 176-77 (Jonathan Elliot ed., 1836).

MARYLAND

In CONVENTION of the DELEGATES of the PEOPLE of the STATE of MARYLAND, April 28, 1788.

We, the Delegates of the People of the state of Maryland, having fully considered the Constitution of the United States of America, reported by Congress, by the Convention of deputies from the United States of America, held in Philadelphia, on the 17th September, 1787, and submitted to us by a resolution of the General Assembly of Maryland, in November session, 1787, do, for ourselves, and in the name and on the behalf of the people of this State, assent to and ratify the said Constitution. In witness whereof we have hereunto subscribed our names,

TUESDAY, *April* 29, 1788.

* * * *

Proposed Amendments.

* * * *

Congress shall have no power to alter or change the regulations respecting the times, places, or manner of holding elections for senators or representatives.

* * * *

True extract from the minutes of the Convention, of the State of Maryland.

William Harwood, Clk. Con.

Done in Convention, April 26, 1788.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 552-54, 556 (Jonathan Elliot ed., 1836).

VIRGINIA

On motion, *Ordered*, That a committee be appointed to prepare and report such amendments as by them shall be deemed necessary, to be recommended, pursuant to the second resolution; and that the Hon. George Wythe, Mr. Harrison, Mr. Matthews, Mr. Henry, Governor Randolph, Mr. George Mason, Mr. Nicholas, Mr. Grayson, Mr. Madison, Mr. Tyler, Mr. John Marshall, Mr. Monroe, Mr. Ronald, Mr. Bland, Mr. Meriwether Smith, Mr. Paul Carrington, Mr. Innes, Mr. Hopkins, Mr. John Blair, and Mr. Simms, compose the said committee.

* * * *

THURSDAY, *June* 26, 1788.

* * * *

Mr. WYTHE reported, from the committee appointed, such *amendments* to the proposed Constitution of government for the United States as were by them deemed necessary to be recommended to the consideration of the Congress which shall first assemble under the said Constitution, to be acted upon according to the mode prescribed in the 5th article thereof; and he read the same in his place, and afterwards delivered them in at the clerk's table, where the same were again read, and are as follows:—

* * * *

AMENDMENTS TO THE CONSTITUTION.

* * * *

"16th. That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same."[1]

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 656-57, 659, 661 (Jonathan Elliot ed., 1836).

NORTH CAROLINA

Friday, August 1, 1788

AMENDMENTS TO THE CONSTITUTION.

* * * *

"17. That Congress shall not alter, modify, or interfere in, the times, places, or manner, of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.

4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 240, 244, 246 (Jonathan Elliot ed., 1836).

NEW HAMPSHIRE

IN CONVENTION of the DELEGATES of the People of the State of NEW-HAMPSHIRE, June the Twenty-first, 1788.

* * * *

And as it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this state, and more effectually guard against an undue administration of the Foederal Government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution:

* * * *

3d. That Congress do not exercise the powers vested in them by the 4th section of the 1st article but in cases when a state shall neglect or refuse to make regulations therein mentioned, or shall make regulations contrary to a free and equal representation.

"The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 550-51 (Bernard Bailyn ed., 1993).

SOUTH CAROLINA

RATIFICATION of the CONSTITUTION, by the STATE OF SOUTH-CAROLINA, May 23, 1788.

Yesterday the Convention determined that a Committee should be appointed to consider if any and what amendments ought to be made in the new Constitution, previous to putting the grand question.

The members of the Committee were Mr. E. Rutledge, Mr. Bee, Mr. Pringle, Judge Pendleton, Rev. Mr. Cummings, Mr. Hunter, Col. Huger, Col. Hill, and Mr. William Wilson.

The Committee reported in nearly the following words:

As the obtaining the following amendments *would tend to remove the apprehensions of some of the good people of this state,* and confirm the blessings intended by the said Constitution, We do declare, that as the right to regulate elections to the Foederal Legislature, and to direct the manner, times, and places of holding the same is, and ought to remain to all posterity, a fundamental right[.]

"The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 556 (Bernard Bailyn ed., 1993).

RESOLUTIONS FROM THE STATE RATIFYING CONVENTIONS CONCERNING PROPOSED ROTATION REQUIREMENTS

VIRGINIA

5th. That the legislative, executive, and judiciary powers of government should be separate and distinct, and that the members of the two first may be restrained from oppression by feeling and participating the public burthens, they should at fixed periods be reduced to a private station, return into the mass of the people; and the vacancies be supplied by certain and regular elections; in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of Government, and the laws shall direct.

"The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 559 (Bernard Bailyn ed., 1993).

NORTH CAROLINA

5th. That the Legislative, Executive, and Judiciary powers of government should be separate and distinct, and that the members of the two first may be restrained from oppression by feeling and participating the public burthens, they should at fixed periods be reduced to a private station, return into the mass of the people; and the vacancies be supplied by certain and regular elections; in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of Government, and the laws shall direct.

"The Ratifications and Resolutions of Seven State Conventions," 2 THE DEBATE ON THE CONSTITUTION 566 (Bernard Bailyn ed., 1993).